



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding RANDALL NORTH REAL ESTATE SERVICES
INC. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPT FFT

Introduction

This hearing was convened as a result of an Application for Dispute Resolution (application) by the tenant seeking remedy under the *Residential Tenancy Act* (Act). The tenant applied for an order of possession under the Act and to recover the cost of the filing fee.

The tenant, legal counsel for the tenant, AK (counsel) and the president of the landlord company (landlord) attended the teleconference hearing. The hearing process was explained to the parties, and the parties were given an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their relevant evidence orally and in documentary form prior to the hearing and make submissions to me. Words utilizing the singular shall also include the plural and vice versa where the context requires.

As both parties confirmed that they had been served with documentary evidence and that they had the opportunity to review that evidence, I find that both parties were sufficiently served in accordance with the Act.

Preliminary and Procedural Matters

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Residential Tenancy Branch (RTB) Rules of Procedure (Rules) Rule 6.11. The parties were also informed that if any recording devices were being used, they were directed to immediately cease the recording of the hearing. In addition, the parties were informed that if any recording was surreptitiously made and used for any purpose, they will be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation under the Act. Neither party had any questions about my direction pursuant to RTB Rule 6.11.

In addition, the parties confirmed their respective email addresses at the outset of the hearing and stated that they understood that the decision would be emailed to them.

Issues to be Decided

- Is the tenant entitled to an order of possession for the rental unit under the Act?
- If yes, is the tenant entitled to the recovery of the cost of the filing fee under the Act?

Background and Evidence

A copy of the tenancy agreement was not submitted in evidence. The tenant (whom will also be referred to as applicant) was asked why the tenancy agreement was not provided and the tenant indicated it was “in their stuff”. The tenant could not recall when the tenancy began but estimates that it was “2.5 to 3 years ago” and that there has been “a couple of rent increases”. The tenant testified that monthly rent was \$1,214.00 per month and due on the first day of each month.

The tenant and counsel referred to a previous decision of which the file number has been included on the style of cause for ease of reference (Previous Decision). The Previous Decision dated October 6, 2021 dismissed the tenant’s application with leave to reapply as the tenant incorrectly named a former landlord. The landlord testified that they do not consider the applicant as a tenant as they don’t have a tenancy agreement, and the previous landlord (Previous Landlord) sold the property to them and had advised them in August 2021 that the tenant had abandoned the rental unit. The landlord testified that the sale completed as of September 2021 and that the tenant has paid no rent to them nor has reached out to them in any way other than an incoherent phone conversation, which the landlord stated they could not make sense of.

In the Previous Decision on page 5, the arbitrator writes regarding AO (Previous Landlord) the following:

AO did not deny that the tenant paid \$1215.00 in early August 2021; however, she decided to apply that payment to carpet replacement she had charged the tenant.

[Reproduced as written]

In addition, on page 7 of the Previous Decision, the arbitrator wrote:

It appears the landlord subsequently decided to reallocate the payment to be applied to a charge for carpet replacement. The landlord stated the tenant agreed to pay for

the carpet replacement; however, the tenant disputed that he had agreed to pay the amount charged and that the cheque was for rent. Considering the cheque given to the landlord statement the payment was for rent and in the absence of the tenant's agreement to have the cheque applied to the carpet replacement charge, I find the landlord made a unilateral decision to reallocate the payment.

Where a party presents payment and expressly indicates the payment is for a certain thing, the recipient does not have the unilateral right to decide to apply the payment to something else and then hold the payor in default for the thing they had actually presented payment for. Therefore, I find the landlord misappropriated the payment and rent had in fact been paid for August 2021.

In light of the above, I find the landlord did not have a basis for issuing a 10 Day Notice for unpaid rent on August 16, 2021 as rent had been paid.

Section 46 of the Act only permits a landlord to serve the tenant with a 10 Day Notice for unpaid rent or utilities. Had the landlord intended to charge and collect a carpet repayment amount from the tenant, the landlord's remedy was to seek a Monetary Order against the tenant. The landlord's remedy is not to take a rent payment, apply the rent payment to something else and then issue a 10 Day Notice for unpaid rent. In doing what the landlord did, which was misappropriation of a rent payment, the landlord in essence tried to evict a tenant for non-payment of an amount other than rent or utilities by way of a 10 Day Notice, which is not permissible.

[Reproduced as written]

And on page 8 of the Previous Decision, the arbitrator wrote:

The tenant's request for an Order of Possession is dismissed with leave to reapply against the correctly named landlord.

[Reproduced as written]

Counsel referred to their letter to the landlord dated October 25, 2021. In that letter counsel advises the landlord that a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (10 Day Notice) was issued by the previous landlord and was cancelled and that the tenant has been locked out of the rental unit since the end of August 2021. Counsel also writes that the tenant "has been taking active steps to restore his tenancy at the Unit and now that the prior eviction has been set aside, he is entitled and prepared to resume possession of the Unit."

Counsel also writes that they are prepared to seek an Order of Possession if they do not allow the tenant to resume his tenancy. Counsel also asks the landlord to accept payment of rent from the tenant for November 2021, and any amount owing for October 2021 and allow him to resume residing in the rental unit. Counsel writes "There is no

valid reason for [name of landlord] to treat his tenancy as terminated at this time.” Counsel submits that the landlord has no authority to end the tenancy.

The landlord testified that the property was purchased from the Previous Landlord who advised them that the applicant had abandoned the rental unit and was not residing in the rental unit as of September 2021 when the landlord assumed ownership of the rental building. The landlord reiterated that they do not view the applicant as a tenant as no rent has been paid, there has been no coherent contact from the tenant to date, and that the landlord has not changed the rental unit locks as the Previous Landlord changed the locks to the master lock and not the landlord. The landlord testified that they did not end the tenancy, the applicant abandoned the rental unit and has not returned to seek possession of the unit or speak coherently to the landlord about the rental unit.

The landlord presented a response letter to counsel's October 25, 2021 letter, which reads in part as follows and is dated November 4, 2021 (Landlord's Letter):

We received your letter dated October 25, 2021. I cannot speak to the notice of termination that was set aside as we were not a party to the arbitration nor did we prepare/serve the same notice of termination. The timing of the dispute [redacted] had all predates our client's ownership of the property.

Here are the facts we have:

- We were advised by the previous owner that suite [redacted] was vacant when our client took over the ownership of the building on September 1, 2021.
- The unit has been vacant since September 1, 2021.
- [redacted] has not been living in the suite since September 1, 2021, nor has he made any demands to us regarding the suite now for over 60 days.
- [redacted] has not paid rent to us for September, October, November 2021.

Given the above, it is obvious that [redacted] has moved out of the suite and lives elsewhere. The previous owner had placed items left behind by [redacted] in storage; please advise your client to make arrangements to retrieve these or they will be disposed of.

[Reproduced as written except for anonymizing names to protect privacy]

The applicant was asked why they left the rental unit, and they replied that they were paying “day by day rent” in a hotel since the “early summer” because they “would have been bullied or intimidated” if they stayed at the rental unit. There was no documentary evidence presented that supports that the tenant had ever expressed these concerns to the Previous Landlord as a reason for leaving their rental unit.

Counsel stated that the tenant was advised by former counsel to withhold paying rent and then confirmed that they did not have any personal knowledge of why the rent was not paid to the new landlord as of September 1, 2021.

Counsel was asked why there was a delay between receiving the October 6, 2021 Previous Decision and applying for an order of possession 32 days later on November 8, 2021. Counsel submits that they were hopeful that a negotiated settlement would occur with the landlord, which ultimately did not occur.

The parties were advised that I would be determining if I found that the tenant abandoned the rental unit or not as there is no dispute that the landlord did not issue a Notice to End Tenancy. The landlord stated that there was no reason to issue a Notice to End Tenancy as the applicant had abandoned the rental unit based on the information from the Previous Landlord and due to no coherent communication from the applicant directly.

Analysis

Based on the testimony of the parties and the documentary evidence before me, and on the balance of probabilities, I find the following.

Firstly, section 54 of the Act applies and states:

Order of possession for the tenant

54(1) A tenant who has entered into a tenancy agreement with a landlord may request an order of possession of the rental unit by making an application for dispute resolution.

(2) The director may grant an order of possession to a tenant under this section before or after the date on which the tenant is entitled to occupy the rental unit under the tenancy agreement, and the order is effective on the date specified by the director.

(3) The date specified under subsection (2) may not be earlier than the date the tenant is entitled to occupy the rental unit.

Based on the above; I find the applicant has failed to provide sufficient evidence to support that they did not abandon the rental unit. Therefore, I find the applicant is no longer a tenant as I find they abandoned the rental unit by failing to pay rent for

September 2021 and have been living in a hotel since the early summer of 2021. In reaching this finding I have considered that the applicant admitted that they have been living in a hotel since early summer of 2021, that the tenant has provided no documentary evidence that they wrote to the Previous Landlord that they were concerned about being intimidated or harassed, and that the tenant and counsel had insufficient reason to explain why the tenant was advised not to pay rent to the new landlord.

In addition, I find the landlord had no reason to consider the applicant a tenant based on the landlord's testimony that they were advised that the applicant had abandoned the rental unit, and that no attempts from applicant were made until they received a letter from counsel dated October 25, 2021. And finally, I find the Landlord's Letter dated November 4, 2021, supports that the Previous Landlord stored the applicant's personal property in accordance with the **Abandonment of personal property** section of the *Residential Tenancy Regulation*, section 24.

Given the above, I find the tenant has provided insufficient evidence to support that they did not abandon the rental unit and as a result, I dismiss the tenants' application for an order of possession due to insufficient evidence, without leave to reapply.

The filing fee is not granted as the application has no merit.

Conclusion

The tenant's application is dismissed in its entirety.

The filing fee is not granted.

This decision will be emailed to both parties at the email addresses confirmed during the hearing.

I find the rental unit was abandoned and therefore no tenancy currently exists. This decision is final and binding on the parties, unless otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: December 8, 2021